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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1400

COWLES BROADCASTING, INC. and
COWLES COMMUNICATIONS, INC.,

Petitioners,

v.

CENTRAL FLORIDA ENTERPRISES, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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STATUTORY PROVISIONS INVOLVED

In addition to the provisions mentioned by Petitioners,[1] Sections 307(b), 308(b), 309(a), and 309(e) of the Communications Act of 1934, as amended, are pertinent to this proceeding.[2]

[1] Petitioners' Brief, p. 3, fn. 2 and 3. See Appendix I to Petition For A Writ Of Certiorari, pp. 312a, 313a.

[2] See attached Appendix at 1a.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Are there involved issues of such national or Constitutional consequence requiring the intervention of this Court where:

(1) There is no disharmony between the Court of Appeals decision under review and any decision of this Court;

(2) The Court of Appeals decision under review properly concluded that a Commission conclusion of affirmative public interest finding warranting grant of Petitioners' application for renewal of license of Television Station WESH-TV, Daytona Beach, Florida, could not be reconciled with the record developed after the Commission's own designation of two sets of issues relating to basic character qualifications of Petitioners for retention of license. The Commission made findings and conclusions adverse to Petitioners on issues relating to move of the WESH-TV main studios from its required location in the Daytona Beach area 70 miles southward to the Orlando area in search of more lucrative profits in violation of Commission rule and in violation of a Commission directive that WESH-TV could not change its main studio location to relocate in the Orlando area. Further, in such a record as was developed, the Commission also made findings and reached conclusions adverse to Petitioners in consequence of magazine circulation practices "rife"[3] with fraudulent conduct on a massive basis implicating Petitioner Cowles Communications, Inc.;[4]

[3]This is the description used by the Presiding Officer. See Appendix E to Petition For A Writ Of Certiorari at p. 128a.

[4]Central complained and the Court of Appeals agreed that the Commission did not afford Central adequate opportunity to develop a full record on these issues. See Appendix A to Petition For A Writ Of Certiorari, pp. 25a-26a.

(3) Not withstanding concerns of Petitioners to the contrary,[5] the Court Decision under review holds only that in this particular case the Commission must follow its own articulated standards[6] rather than fashioning a result-oriented decision favorable to the WESH-TV incumbent.

COUNTERSTATEMENT OF THE CASE

The Peitioners' Statement of the Case is not in proper context and in some respects is somewhat distortive and misleading. A counterstatement is appropriate.[7]

On October 31, 1969, Cowles Florida Broadcasting, Inc., then a subsidiary of Cowles Communications, Inc.,[8] tendered its application for renewal of license of Television Station WESH-TV in the public interest. Under applicable statutes,[9] an applicant for renewal of a television license must make an affirmative showing to warrant a Commission determination that grant of its application will be in the public interest, convenience, and necessity.

[5]Petitioners' Brief, p. 3.

[6]See Appendix C to Petition For A Writ Of Certiorari, p. 52a.

[7]We note that Peitioners seem to have no essential quarrel with the Court of Appeals' description of the course of the litigation (See Appendix A to Petition For A Writ Of Certiorari at pp. 8a-19a).

[8]Central submits that, contrary to the representations made by Petitioners (Brief for Petitioners, p. 4, fn. 4), more was involved than mere change of articles of incorporation when the licensee name of WESH-TV was changed to Cowles Broadcasting, Inc. While this will not be pursued at present, it is not a representation which Respondent views with uncritical acceptance.

[9]Sections 308(b) and 309(a) of the Communications Act of 1934, as amended.

On January 2, 1970, Respondent Central Florida Enterprises, Inc. filed with the Commission a competing application wherein Central sought to dislodge the absentee owned Cowles media complex[10] as the controlling operator of WESH-TV. A full comparative renewal hearing was required between Central and WESH-TV.[11]

Of course, the Communications Act and the *Ashbacker* precedent of this Court require a comparison between applicants in the Commission licensing selection process. However, there were unusual factors present here which ought to be mentioned and which might very well escape the notice of this Court were it to adopt in fact and in context the Petitioners' Statement of the Case.[12]

The Commission is required by law to enforce the regulatory scheme which implements its own rules and regulations.[13] The Commission is empowered by law to require applicants to make a showing sufficient to assure that they possess the requisite character qualifications to be or to retain licenses[14] to be "fiduciaries"[15] of

[10]There are numerous media interests attributable to the Cowles media complex. The Administrative Law Judge, the Commission and the Court so found. See Appendix A, pp. 11a-13a and 26a-30a; Appendix B, p. 43a; Appendix E, pp. 106a-108a and 132a-133a; Appendix F, pp. 180a-181a.

[11]*Ashbacker Radio Corp. v. Federal Communications Commission*, 326 U.S. 327 (1945); *Citizens Communications Center v. Federal Communications Commission*, 447 F.2d 1201 (1971).

[12]Hence, notwithstanding Petitioners' representation (Brief, p. 4), this comparative renewal is "typical" only in the sense that in accordance with time-honored practice, the Commission preferred the incumbent over the challenger (See Appendix C, pp. 51a-52a and fn. 19-23 to Petition For A Writ Of Certiorari).

[13]*Service v. Dulles*, 354 U.S. 362 (1957).

[14]Sections 308(b) and 309(e) of the Communications Act of 1934, as amended, fn. 9, *supra*.

[15]See *Office of Communication of United Church of Christ v. Federal Communications Commission*, 359 F.2d 994 (1966).

the public. Where the Commission believes that questions are raised about threshold character qualifications, the Commission may designate appropriate issues. If issues relating to basic qualifications are resolved adversely to an applicant, the proceeding may end there without any comparison of a competing applicant.[16] The Petitioners' Statement of the Case is significant for its egregious failure to take this principle into account except in passing.[17] The failure of Peitioners to have made a showing on designated issues relating to basic character qualifications could have disqualified Petitioners and the Commission evaluation process could have come to an end as long as Central was qualified.[18] The Commission proceedings could have come to an end even if Central were not qualified. There were two separate braces of character issues designated against Petitioners. Each will be discussed in turn.

Respondent Central, a Daytona Beach based citizens group, filed a competing application because Petitioner WESH-TV had virtually abandoned its required main studio license location in the Daytona Beach Area for a more lucrative and unauthorized location in the Orlando Area, some 70 miles south.[19] The Commission desig-

[16]*Guinan Realty Co. v. Federal Communications Commission*, 297 F.2d 782 (1961).

[17]Petitioners Brief, pp. 4-5.

[18]Central was qualified. Petitioners have not suggested, either in this Court, or in the Court of Appeals, that Central is not qualified.

[19]As counsel for Central has pointed out at oral argument before the Commission, this can be analogous to a situation in which a Commission licensee moved the main studio of a Washington television station to a location north of Baltimore in violation of Commission Rules to garner more revenues. FCC Docket No. 19168 et al., Tr. 4648-4649.

nated issues relating to the basic character qualifications of Petitioners to retain the license of WESH-TV in light of the serious allegations made.[20]

Petitioners, we submit, have incorrectly advanced to the Court spurious claims for preference for location of the so-called WESH-TV "auxiliary studios"[21] in the Orlando Area. Findings and conclusions made by the Administrative Law Judge,[22] the Commission,[23] and the Court of Appeals[24] were uniformly adverse to Petitioners in holding that the *main* studio location—*not* the "auxiliary" studios—of WESH-TV was in the Orlando Area. In fact, while the Administrative Law Judge expressly gave credit to Respondent under the comparative—as contrasted to the qualifying issues[25]—for proposed use of studios in the Orlando Area, the Commission properly excluded any such claimed preference by WESH-TV in light of the overwhelming indications that the main

[20]See Issues 2(d) and 2(f) in the Commission Hearing Designation Order, 36 Federal Register 4901. For the language of these issues, see Appendix E, pp. 57a-58a to the Petition For A Writ Of Certiorari. Evidence adduced under these issues was considered under the comparative evaluation as well.

[21]Petitioners Brief, p. 4.

[22]Appendix E, pp. 77a-86a, 122a-128a to the Petition For A Writ of Certiorari.

[23]Appendix E, pp. 172a-175a, 185a-194a to the Petition For A Writ of Certiorari.

[24]Appendix A, pp. 9a-10a, 23a-25a.

[25]Qualifying issues are those which relate, *vel non*, to basic eligibility; comparative issues are those which assess qualified applicants under criteria established by the Commission. Evidence adduced under qualifying issues may be considered under comparative issues as well.

studios of WESH-TV were consciously relocated in the Orlando Area.[26]

Further, while it is not an important point, *per se*, we submit that Petitioners advance another spurious argument to this Court in claiming that Respondent Central should be faulted for electing not to introduce evidence concerning proposed programming at hearings before the Commission. The plain fact is that such evidence would have been excluded. Petitioners unsuccessfully sought—twice[27]—to obtain from the Commission's Review Board a so-called "diminution of service" issue which would have required programming comparisons. Petitioners had claimed preference for use of their "auxiliary" studios in the Orlando Beach area; by contrast, at least according to Petitioners, Central's proposal to have a single studio located at Daytona Beach would result in loss of a transmission service.[28] In denying this motion the first time, the Review Board had reminded Petitioners that the primary obligation of WESH-TV programming was to the Daytona Beach—not the Orlando—Area. Indeed, the Review Board pointedly reminded Respondent of a 1960 pronouncement relating to WESH-TV itself that while the station could identify itself as "Daytona Beach-Orlando", there should be no misunderstanding

[26]Compare Appendix E, p. 137a with Appendix F, pp. 226a-227a and Appendix A, p. 24a-25a.

[27]*Cowles Florida Broadcasting, Inc.*, 31 FCC 2d 458, 22 RR 2d 868 (1971); *Cowles Florida Broadcasting, Inc.*, 35 FCC 2d 228, 24 RR 2d 573 (1972).

[28]The distinction between "transmission service" and "reception service" will be explained separately, Respondent's Brief, *infra*, p. 15.

of the Commission action granting that request, as indicated by the following:[29]

> "It should be emphasized that grant of your request for waiver does *not* modify your license, change your station location as specified in your license, or change your obligations to your principal city, Daytona Beach, in any way."

Respondent Central has initially and consistently represented that its principal purpose in seeking to displace Petitioners is to return the WESH-TV main studio to the area of the station's required city of license, Daytona Beach. The unsuccessful requests of WESH-TV to claim for credit emphasis on programming to Orlando reinforce the validity of Respondent Central's position.

In another representation improperly advanced to this Court, Petitioners attempt to downplay comparative disabilities of attributable media ownership.[30] This representation not only distorts the importance given by the Court of Appeals to the criterion of diversification of mass media of communications in this case, it is a surprising disregard by an experienced broadcaster for Commission precedent[31] which uniformly disallows any attempts by applicants in comparative hearings to improve their positions by removing or alleviating comparative disability through disposing of attributable media interests after initiation of hearing process by the Commission.

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[29] *Cowles Florida Broadcasting, Inc.*, 22 RR 2d 868 at 872-873.

[30] Petitioners Brief, p. 5, fn. 6.

[31] *Azalea Corp.* 38 FCC 2d 95, 25 RR 2d 975 (1972); *Triple C Broadcasting Corporation*, 12 FCC 2d 503, 12 RR 2d 1008 (1968); *News-Sun Broadcasting Co.*, 24 FCC 2d 770, 19 RR 2d 942 (1970).

Petitioners' characterizations of the evaluations made by the Administrative Law Judge, the Commission, and the Court of Appeals are disquietingly—but by now, predictably—imprecise. Contrary to the Petitioners' assertions,[32] Respondent Central prevailed on every single comparative criterion of consequence: local ownership, integration of ownership and management, lack of affiliation with mass media of communication, main studio move, and "mail fraud" issues. On the issues related to Petitioners' basic character qualifications—inexplicably included in Petitioners' Statement of the Case as among ". . . [N]umerous other subsidiary issues [which] were raised . . ."[33]—the Court of Appeals took due cognizance of the result oriented agency process which has historically and consistently preferred an incumbent over a challenger. Ultimately, the Commission had preferred Cowles, relying in part on "administrative feel." On review of the record as a whole, and with particularized references to conclusions evaluated by the Commission, the Court of Appeals simply could not reconcile the Commission process in this case with requirements of the law and the record developed by the Commission itself.[34]

On reconsideration requested by the Commission, the Court of Appeals took great care to show[35] that there

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[32] Petitioners Brief, pp. 4-7.

[33] Compare Petitioners Brief, pp. 4-5 to the language of the issues designated as issues 2(d), 2(e) and 2(f) of the Initial Decision, Appendix E, pp. 57a-58a, to the Petition For A Writ Of Certiorari.

[34] See Appendix A, pp. 1a-38a to Petition For A Writ Of Certiorari.

[35] See Appendices B-D, pp. 39a-53a to Petition For A Writ Of Certiorari.

is no disharmony whatsoever between its decision in this case and the decision of this Court in the *NCCB* case.[36]

In sum, we submit the Petitioners' claims that there have been legal and factual errors of national importance requiring the extraordinary remedy of intervention by this Court are premised upon a Statement of the Case which is flawed and imprecise. This Counterstatement of the Case provides a more appropriate backdrop against which to weigh Petitioners' request for the extraordinary relief sought.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO DISHARMONY BETWEEN THE COURT OF APPEALS DECISION UNDER REVIEW AND THE DECISION OF THIS COURT IN NCCB WHICH REQUIRES INTERVENTION OF THIS COURT

Petitioners posit a claim of fundamental conflict between the Court of Appeals Decision under review and the *NCCB* decision. For the reasons which follow, we submit that Petitioners err. There is no conflict with *NCCB* presented. At the outset, we note that the Commission has not sought *certiorari* in this case. Hence, the Commission must be presumed to have concluded that the Court of Appeals pronouncements issued in January 1979 have removed any substantial conflict which the Commission believed may have existed between the Court of Appeals pronouncements in this case[37] and *NCCB*.

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[36] *Federal Communications Commission v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978).

[37] If, in the unlikely event that the Commission believes that Petitioners' Request For A Writ Of Certiorari should be granted, simple fairness to the Respondent Central dictates that this Court seek from the Commission reasons why the Commission itself did not seek *certiorari*.

[footnote continued]

There was no reason for the Court of Appeals to reconcile its reasoning in this licensing case with the *NCCB* decision of this Court. Argument in this case took place before a panel of the Court of Appeals on June 6, 1978. The *NCCB* case was decided June 12, 1978. The Commission's General Counsel, by letter,[38] advised the Court of Appeals of issuance of this Court's decision in the *NCCB* case. The Court of Appeals was perfectly aware of the *NCCB* decision. The Court of Appeals did not set reargument or require the filing of memoranda from the parties concerning the implications of the *NCCB* decision. Thus, when the Court of Appeals issued its opinion in this case on September 25, 1978, the Court made no mention of the *NCCB* decision because none was required. When the Commission and Petitioners here both filed Petitions for Reconsideration and Suggestion for Rehearing En Banc, the Court of Appeals, expressing surprise that this *single* case had caused such considerable reverberations as were claimed upon the broadcasting industry,[39] expressly reconciled its decision with this Court's rationale in the *NCCB* case.[40] Petitioners cannot be heard to complain.

The factual situation presented to this Court in the *NCCB* case was entirely different from that at issue here. In *NCCB*, the Court reviewed rather sweeping appellate

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[38] The date of the letter is June 19, 1978.

[39] See Appendix C, pp. 51a-52a to Petition For A Writ Of Certiorari.

[40] See Appendix B, pp. 42a-43a to Petition For A Writ Of Certiorari.

court determinations involving divestiture, *vel non*, of all colocated newspaper-television combinations in the United States. While this Court, in *NCCB*, could not agree that total divestiture of colocated television-newspaper combinations was warranted, the Court did sustain the Commission's determination that divestiture in 16 colocated newspaper-broadcast ownership combinations was required[41] because of "egregious" circumstances. In the *NCCB* decision the Court did sustain a prospective Commission rule barring cross-ownership of newspaper-television combinations.[42]

Notwithstanding Petitioners' arguments, the *NCCB* decision of this Court did not abrogate the right of Respondent to seek a full hearing required by statute[43] and this Court's landmark decision in the *Ashbacker* case. Indeed, this Court in *NCCB* cited with approval[44] the Court of Appeals decision in the *Citizens* case,[45] which struck down protectionist standards of the Commission in comparative renewal proceedings and which reaffirmed that *Ashbacker* rights do apply to the comparative renewal process. In so doing, the Court observed that, after issuance of the *Citizens* decision, the Commission had adopted new policies to apply to the comparative

[41] Some of these situations involved cross-ownership of newspapers and radio stations.

[42] This Court, in *NCCB* also sustained a Commission determination to "grandfather" existing colocated newspaper-televison combinations other than the "egregious" sixteen.

[43] Section 309(e) of the Communications Act, as amended.

[44] *NCCB, supra*, at pp. 782-783, fn. 5.

[45] *Citizens Communications Center v. Federal Communications Commission*, 447 F.2d 1201 (1971).

hearing process involving renewal applicants[46] and that these 1977 FCC standards were being subjected to judicial review in the Court of Appeals in a then pending proceeding, the *NBMC* case.[47] What Petitioners fail to point out is that upon judicial review of the Commission's 1977 policies in *NBMC*, the Court of Appeals could find no difference between the Commission 1977 comparative renewal policies and those 1970 protectionist policies which the Court of Appeals had struck down as contrary to *Ashbacker* in the *Citizens* case. In *NBMC*, the Court of Appeals affirmed the Commission only insofar as the Commission refused to adopt minimal percentages of nonentertainment public interest types of programming as standards in assessing whether or not a television license ought to be renewed.[48]

We note that the Commission did not seek Court of Appeals reconsideration of the *NBMC* decision nor did the Commission request *certiorari* in that case.[49] The *NBMC* case is still law. The *NCCB* case neither abrogates nor diminishes in any way the right of a challenger to a full *Ashbacker* hearing. This is the standard by which the Court of Appeals judged the hearing case under review and it remains the standard in which the Court of Appeals properly found the Commission's process legally defective and the Petitioners' showing underwhelming.

[46] *Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming From the Comparative Hearing Process*, 66 FCC 2d 419 (1977).

[47] *National Black Media Coalition v. Federal Communications Commission*, 589 F.2d 578 (1978); *NCCB, supra*, at pp. 806-808.

[48] See *NBMC, supra*, at 589 F.2d 578 (1978); See Appendix A to Petition For Writ Of Certiorari, pp. 22a-23a, fn. 61-64.

[49] Neither did any of the several television licensees and/or industry organizations which intervened in that case.

Despite assumptions to the contrary, *NCCB* recognizes and reaffirms that broadcasters do not have an unabridgeable First Amendment right to speak or publish.[50] The Commission acts well within its public interest responsibilities in concluding that benefit to the public interest can follow from allocation of broadcast licenses so as to promote diversification of mass media as a whole.[51] *NCCB* reaffirmed decisions of this Court which hold that the public interest standard necessarily invites reference to First Amendment principles;[52] that traditionally, there is a First Amendment goal of achieving the widest possible dissemination of information from diverse and antagonistic sources;[53] and, as a logical extension of this doctrine, that, because of the physical scarcity of broadcast signals, it is the First Amendment right of viewers and listeners to be informed which is paramount, not the right of broadcasters.[54]

In *NCCB*, this Court recognized that consistent with law there may be legitimate expectancies created in licensees. However, *nowhere* did the reasoning of this Court extend that expectancy to a television station which moves its main studio 70 miles in direct contravention of a Commission rule designed to implement the statutory scheme and a specific Commission directive advising the very station involved that its obligations to the Daytona Beach Area were paramount.

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[50] *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969).

[51] *NCCB, supra*, at p. 795.

[52] *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973).

[53] *Associated Press v. United States*, 326 U.S. 1, at 20 (1945).

[54] *Red Lion, supra.*

Under Section 307(b) of the Communications Act of 1934, as amended, the Commission is required by Congress to assign broadcast facilities among the various states and communities when and insofar as there is demand for the same on a fair efficient and equitable basis. Broadcasting service consists of "transmission service", the availability of a station to serve as a local outlet for expression on varying subjects relating to news, public affairs, and programming of interest to the area immediate to license location; and "reception service", the ability to deliver an acceptable signal to its entire area of license. The ratification of an acknowledged move of a main studio more than 70 miles away for profit in derogation of the rule implementing the statutory scheme to diversify transmission outlets creates a frightening spectre concerning "expectancies". If violations of rules and adverse findings on issues and evidence relating to basic character qualifications are treated with such indifference, the result reached will not only contravene Respondent's due process rights, it will be in derogation of the Daytona Beach Area's First Amendment rights to a local transmission outlet under *Red Lion*.

While Petitioners have expounded greatly about "meritorious" service of WESH-TV, the record before the Commission and the Court documents no such claim. *Ipse dixit* statements will not suffice. Further, such claims about "meritorious" service have to be seriously suspect in light of the virtual abandonment of the main studio in the area of the required city of license,[55] a matter of such importance as to warrant Commission designation of a basic character issue against WESH-TV

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[55] As the Review Board held, *twice*, fn. 27, *supra*, WESH-TV had a primary responsibility to serve the Daytona Beach Area.

and findings adverse to WESH-TV which were not overcome by any countervailing showing of consequence.

II.

THE COURT OF APPEALS MADE NO SERIOUS ERRORS OF LAW OR FACT

Petitioners' arguments, to the extent they have not been addressed before,[56] are unavailing. No error requiring intervention of this Court has been shown in regard to the observations of the Court of Appeals about "common officers" and the curtailment of inquiry on the "mail fraud" issues. Indeed, the presentation of Petitioners is not without considerable circularity. On the one hand, Petitioners allege that the Commission has fully discussed these matters. In virtually the next breath, Petitioners state that Respondent Central has raised them too late. Unsurprisingly, these contradictory claims are unsupported by any claim or citation to Petitioners' Appendix. We submit that the Court has acted properly.[57] The Commission was less than thorough. In short, the Petitioners would stand on its head the long established axiom that licensees are expected to be law abiding.

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[56]Petitioners Brief, pp. 17-19. Three arguments were advanced here: (1) inconsistency with the *NCCB* decision; (2) misreading of rights guaranteed by the comparative renewal process and FCC interpretations and findings concerning its main studio rule; (3) misreading of the record concerning "mail fraud" issues. Only (3) will be addressed here, since (1) and (2) have already been discussed.

[57]See Appendix A, pp. 25a-26a.

III.

THE COURT OF APPEALS HAS NOT ATTEMPTED TO OBFUSCATE INCONSISTENCIES, NOR HAS THE COURT LEFT IN UTTER CONFUSION EITHER THE COMMISSION'S PUBLIC INTEREST STANDARD, OR THE OBLIGATIONS AND RENEWAL EXPECTANCIES OF ALL INCUMBENT BROADCAST LICENSEES, OR THE APPROPRIATE ACTION FOR PETITIONERS

The last line of Petitioners argument, if it may be termed such, is overdrawn, overbroad, and somewhat pejorative. If there are confusing and ambiguous descriptions relating to the WESH-TV broadcast record, they come from various and conflicting pronouncements of the Commission conveniently tailored to each situation involving a challenger and a renewal applicant and are not fashioned by any Court of Appeals decision.

The Commission's statutory standard is set forth in *Ashbacker* requiring full hearing on all issues of fundamental public interest importance. All the Commission has to do is follow *Ashbacker* and its own articulated standards. Another result oriented process will not do. The "chilling" effect on the practical exercise of the right of the public to engage in the comparative renewal process is obvious; no challenger has so much as filed to displace a television renewal applicant for more than four years. No challenger has ever displaced a renewal applicant in the comparative process.

Petitioners claim industry-wide uncertainty, an argument that is patently overdrawn.[58] Statistically, as the Court of Appeals has found, valid renewal expectancies persist for television licensees. However, a licensee

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[58]Compare Appendix C, pp. 51a-52a, to Petition for A Writ of Certiorari.

would be well advised to avoid moving its main studios 70 miles. A licensee would do well to avoid being implicated in business practices "rife" with fraud. Television licensees cannot seriously argue that a requirement of noninvolvement in improper practices raises a nonforeseeable standard of conduct which cannot be met.[59] A licensee must be more than a profit center for its owner. It should also be mentioned, though it hardly need be, that mail fraud is a crime of moral turpitude. It is not asking too much of users of scarce natural resources that they be expected to avoid and refrain from such conduct if they desire to remain licensees. After all, no one has ever *required* anyone to get into and stay in the broadcasting profession.

A Commission which claims the right to maintain standards of "industry stability" while condoning such egregious transgressions of its own policies and standards cannot receive the sanction of a Court of law. The public is entitled to an "industry stability" which eschews fraud and abandonment of the required location of a station.

April 12, 1979

[59] *Yale Broadcasting v. Federal Communications Commission*, 478 F.2d 594 (1973).

CONCLUSION

The Petition For a Writ Of Certiorari must be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

RELEVANT STATUTORY PROVISIONS INVOLVED

47 U.S.C. § 307(b):

In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

47 U.S.C. § 308(b):

All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee.

47 U.S.C. § 309(a):

Subject to the provisions of this section, the Commission shall determine, in the case of each applicant filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

47 U.S.C. § 309(e):

If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.